International Covenant on Civil and Political Rights

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Human Rights Committee

Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 2250/2013*, **

Communication submitted by:	Oleksii Katashynskyi (represented by counsel, Sergiy Zayets)
Alleged victim:	Oleksii Katashynskyi
State party:	Ukraine
Date of communication:	19 March 2013 (initial submission)
Document references:	Decision taken pursuant to rule 97 of the Committee's rules of procedure, transmitted to the State party on 10 June 2013 (not issued in document form)
Date of adoption of Views:	25 July 2018
Subject matter:	Violation of the right and opportunity to take part in the conduct of public affairs and to be elected at genuine periodic elections
Procedural issues:	Exhaustion of domestic remedies; substantiation
Substantive issues:	Political activities; taking part in conduct of public affairs; voting and election; fair trial
Articles of the Covenant:	2, 14 and 25
Article of the Optional Protocol:	2

1. The author of the communication is Oleksii Katashynskyi, a Ukrainian national born in 1967. He claims to be a victim of a violation by Ukraine of his rights under articles 2, 14 and 25 of the Covenant. The Optional Protocol entered into force for the State party on 25 October 1991. The author is represented by counsel.

The facts as presented by the author

2.1 In October 2010, the author stood as a candidate for deputy of the Sevastopol City Council in the single-seat electoral constituency No. 17 in the election of People's Deputies to the Verkhovna Rada of the Autonomous Republic of Crimea (local elections). The

* Adopted by the Committee at its 123rd session (2–27 July 2018).

** The following members of the Committee participated in the examination of the communication: Tania María Abdo Rocholl, Yadh Ben Achour, Ilze Brands Kehris, Sarah Cleveland, Ahmed Amin Fathalla, Olivier de Frouville, Christof Heyns, Bamariam Koita, Marcia V.J. Kran, Duncan Laki Muhumuza, Mauro Politi, José Manuel Santos Pais, Yuval Shany and Margo Waterval.

procedure for the conduct of the elections in Ukraine is subject to the Law on Elections of People's Deputies of the Verkhovna Rada of the Autonomous Republic of Crimea, Local Councils, and Village, Township and City Mayors (the Law on Elections).[1] Constituency No. 17 consisted of five polling stations in the Gagarinsky district of Sevastopol. The author claims that he was denied his right to be elected as a result of the lost ballots in one of the polling stations, in which he had won the majority of votes.

2.2 The author states that, according to the results of the voting, which was held on 31 October 2010, his main opponent was Mr. G., given that the other candidates received an insignificant number of votes. According to the records of the polling station electoral commissions, the votes of the electorate were cast as set out below. The author received the most votes at polling station No. 02076.

Polling station No.	*Katashynskyi O.O. (number of votes)*	*G. S.A. (number of votes)*	*Preponderance in favour of Katashynskyi O.O., votes (+/-)*
02074	142	175	-33
02075	131	108	+23
02076	209	150	+59
02077	99	131	-32
02183	0	2	-2
Total	**581**	**566**	**+15**

2.3 On 1 and 2 November 2010, after the polling station electoral commissions had counted the votes and drawn up their reports, they transmitted them, together with other election-related documentation, to the Gagarinsky district electoral commission. On 3 November, after the Gagarinsky district electoral commission had accepted the documentation, it decided to conduct a recount of the votes deposited at polling stations Nos. 02075, 02076 and 02077. On the same day, during the vote recount, it was established that election-related documentation from the polling station No. 02076 was missing. The information concerning the missing documentation from polling station No. 02076 was submitted by the Gagarinsky district electoral commission to the Prosecutor's office. The author submits that no effective investigation was conducted.

2.4 The results reported by the polling station electoral commissions for polling stations Nos. 02075 and 02077 were confirmed during the vote recount.

2.5 On 4 November 2010, the Gagarinsky district electoral commission declared the vote at polling station No. 02076 invalid (without ordering a new election) owing to the inability to recount the votes and to verify the report on the voting results (the voting records) of the relevant polling station electoral commission. On the same day, the report

[1] Although pursuant to the provisions of the Law on Elections there is usually a three-level system of electoral commissions, for Sevastopol and several other regions of Ukraine this system had four levels, owing to the administrative arrangement and status of Sevastopol. The fourth level of the electoral commissions was created as a result of the splitting of the responsibilities of the territorial election commission between the Sevastopol district electoral commissions and the Sevastopol city electoral commission, both of which, according to the Law on Elections, had the status of territorial ones. Elections were therefore conducted by electoral commissions with four levels of hierarchy: (1) polling station electoral commissions, which directly organized the voting process and conducted the calculation of votes at the polling station; (2) district electoral commissions in Sevastopol, which determined the election results in each of the constituencies in the district on the basis of the data received from the polling station electoral commissions; they were also endowed with certain supervisory functions with regard to the polling station commissions (the district electoral commission of relevance in the context of the present communication is the Gagarinsky district electoral commission of Sevastopol); (3) the Sevastopol city electoral commission, which determined the results of the elections on the basis of the data received from the district commissions, and published the names of candidates deemed elected; and (4) the Central Electoral Commission of Ukraine, which had overall responsibility for the elections.

on the election results was drawn up; according to the report, Mr. G. had obtained 416 votes, while the author had obtained 372. The fact that the election results at polling station No. 02076 were deducted from the count of votes by the Gagarinsky district electoral commission led to a situation when the author received 44 fewer votes than his opponent, Mr. G. The said report was transmitted to the Sevastopol city electoral commission to establish the final election results.

2.6 On 5 November 2010, the Sevastopol city electoral commission drew up a report on the election results in constituency No. 17, and declared Mr. G. elected as deputy of the Sevastopol City Council.

2.7 On an unspecified date, the author appealed to the Circuit Administrative Court of Sevastopol against the decisions of the Gagarinsky district electoral commission of 3 November 2010 (on the vote recount) and 4 November 2010 (on the annulment of the results at polling station No. 02076). On 6 November 2010, the Circuit Administrative Court of Sevastopol quashed the two impugned decisions, concluding that the Gagarinsky district electoral commission had failed to ensure the integrity of the election with regard to the documentation of polling station No. 02076. The decision of the first instance court was upheld by the Sevastopol Administrative Court of Appeal on 8 November 2010.

2.8 On 6 November 2010, the author appealed to the Circuit Administrative Court of Sevastopol against the decision of the Gagarinsky district electoral commission of 4 November 2010 (on the election results). He requested the annulment of the report on the election results and referred to the decision of the Circuit Administrative Court of Sevastopol of 6 November 2010 in support of that request. On 8 November 2010, the Circuit Administrative Court of Sevastopol annulled the results of the election.

2.9 On 7 November 2010, the author appealed to the Circuit Administrative Court of Sevastopol against the decision of the Sevastopol city electoral commission of 5 November 2010 (on the election results in constituency No. 17). On 10 November 2010, the Circuit Administrative Court of Sevastopol quashed the decision of the Sevastopol city electoral commission, recognizing Mr. G. as the elected deputy of the Sevastopol City Council in constituency No. 17.

2.10 On 10 November 2010, the Gagarinsky district electoral commission drew up a new report on the vote count on the basis of the decisions of the Circuit Administrative Court of Sevastopol of 6 and 8 November 2010, which effectively confirmed that the author had won a majority of the vote in constituency No. 17. On the same day, the Gagarinsky district electoral commission also annulled its decisions of 3 November (on the vote recount) and 4 November 2010 (on the election results).

2.11 On 12 November 2010, the Sevastopol Administrative Court of Appeal quashed the decision of the Circuit Administrative Court of Sevastopol of 8 November 2010 (see para. 2.9 above) on the basis of an appeal submitted by the Gagarinsky district electoral commission.[2] On the same day, the Sevastopol Administrative Court of Appeal also quashed the decision of the Circuit Administrative Court of Sevastopol of 10 November 2010 (see para. 2.10 above).

2.12 On 15 November 2010, the Gagarinsky district electoral commission attempted to transmit to the Sevastopol city electoral commission the new report on the vote count of 10 November 2010, but the latter refused to accept it. On the same day, the author complained about the actions (omission to act) of the Sevastopol city electoral commission to the Circuit Administrative Court of Sevastopol. On 20 November 2010, the Circuit Administrative Court of Sevastopol rejected the author's complaint, holding that the election results had been published on 9 November 2010 and that, since the election had already been finalized, the Sevastopol city electoral commission had no grounds to accept the new report on the vote count. The decision of the Circuit Administrative Court of Sevastopol was upheld by the Sevastopol Administrative Court of Appeal on 24 November 2010.

[2] The grounds on which the Gagarinsky district electoral commission appealed the decision of the Circuit Administrative Court of Sevastopol of 8 November 2010 are unclear.

2.13 The author submits that the State party law does not allow for an appeal in the court of cassation on election-related matters, and that he has therefore exhausted all available domestic remedies.

The complaint

3.1 The author claims that the unreasonable restrictions violated his right and opportunity to take part in the conduct of public affairs and to be elected at genuine periodic elections by universal and equal suffrage and by secret ballot, guaranteeing the free expression of the will of the electors, guaranteed by article 25 of the Covenant.[3] He adds that the key issue in the present communication is not how arbitrary the vote recount was, but rather the lawfulness of the authorities' refusal to effectively remedy the violation even after the fact of the violation had been established at the domestic level.[4]

3.2 The author also claims a violation of article 2 of the Covenant, and argues that he was deprived of effective means of legal defence at the domestic level, since the State party's courts refused to examine his complaint against the Sevastopol city electoral commission on its merits, referring to the fact that the election had already been finalized. Furthermore, although the author was contesting the election-related decisions made at the time when the election results were still being established, he was unable to keep up with the process; while he was lodging a complaint against one decision, another one of direct relevance to the impugned decision would be taken. Moreover, the decision recognizing Mr. G. as the elected deputy of the Sevastopol City Council effectively put an end to the election and made it impossible for the author to contest that decision.

3.3 The author also claims a violation of his rights guaranteed under article 14 of the Covenant. He refers to the decision of the Sevastopol Administrative Court of Appeal of 24 November 2010 (the final decision in the present communication), according to which, except for the decisions relating to the vote recount and the invalidation of the election at polling station No. 02076, the State party's courts have found themselves to be not competent to examine the author's complaints about the decisions taken by the electoral commissions, pointing to the fact that the resolution of all election-related disputes is solely within the competence of the electoral commissions and that the courts have no right to interfere into how that competence is implemented. The author adds that the electoral commissions have no features of a judicial body and that the State party law establishes that election-related disputes should be examined judicially.

State party's observations on admissibility and merits

4.1 The State party submitted observations on the admissibility and merits on 26 December 2013. With regard to the jurisprudence of the European Court of Human Rights, the State party does not consider it necessary to analyse *Kerimova v. Azerbaijan*, as the case involved another State party with different legislation. Concerning *Kovach v. Ukraine*, the European Court of Human Rights found a violation of article 3 of the Protocol No. 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms in relation to the conflict between articles 70 and 72 of the 2001 Law on Parliamentary Elections, which resulted in a lack of legitimate aim for the interference by the authorities in the author's rights. In the present case, the Law on Elections of People's Deputies of the Verkhovna Rada of the Autonomous Republic of Crimea, Local Councils, and Village, Township and City Mayors (the Law on Elections) has been applied. Therefore, *Kovach v. Ukraine* is not relevant.

4.2 The State party agrees with the facts presented in the author's communication, notably that, on 6 November 2010, the Circuit Administrative Court of Sevastopol (the first instance court) quashed the Gagarinsky district electoral commission decisions of 3

[3] The author refers to European Court of Human Rights judgment of 7 February 2008, *Kovach v. Ukraine* (application No. 39424/02). Although in that case the provisions of another election law were applied (parliamentary elections), the author points out that mutatis mutandis provisions of that law repeated the provisions of the Law on Elections (local elections).

[4] The author refers to European Court of Human Rights judgment of 30 September 2010, *Kerimova v. Azerbaijan* (application No. 20799/06).

November 2010, on the vote recount in polling station No. 02076, and 4 November 2010, on the invalidation of the election results at polling station No. 02076. The Court also recognized the failure of the district electoral commission to ensure the integrity of election-related documentation.

4.3 Furthermore, on 12 November 2010, the Sevastopol Administrative Court of Appeal rejected the author's complaints concerning the actions of the Gagarinsky district electoral commission and the Sevastopol city electoral commission with regard to their decisions (on the voting results, on drawing up a protocol on the election results, on the adoption of a decision on the election results and on the approval of those results) on the grounds that, firstly, at the moment both commissions took the decisions subsequently impugned, they were not aware and could not be aware of the first instance court ruling of 6 November 2010; and secondly, the protocol/report on the election results contains exclusively arithmetic data and cannot be the subject of a claim. The electoral commissions took the decisions on the basis of the documents and facts that they had available at the time. At the moment the decisions were taken, no violations were detected.

4.4 Ukrainian law provides for two ways to appeal the actions of an electoral commission: through the judicial system; and through the higher electoral commission. According to article 85 of the Law on Elections, appeals against actions of or inaction by electoral commissions may be appealed before the higher level electoral commission or in court. Complaints against the failure of the electoral commission to act may be lodged also with the Central Electoral Commission. According to national law, it is not necessary for both ways to be exhausted simultaneously. In the present case, however, the author should have complained to the Central Electoral Commission, because the judges indicated directly in their decisions that the issue of the correct drawing up of the protocol (report) on the election results was outside the scope of their competence and fell fully within that of the electoral commission.

4.5 On the basis of the above, the author has not exhausted all available domestic remedies provided by the State party, in accordance with article 2 of the Covenant. It further maintains that the national judges acted within national legislation and not in violation of article 14 of the Covenant. Lastly, article 25 of the Covenant was not violated by the national authorities.

Author's comments on the State party's observations

5.1 In his comments of 28 May 2014, the author submits that, as the State party rightly explains, the electoral commissions' actions, failure to act and decisions may be challenged in two parallel ways: in court, or before the higher commission. He underlines that the domestic legislation does not limit in any way the competence of the courts in favour of the electoral commissions, as the two avenues are of equal value. Despite the State party's assertion that the national court lacked competence to review an election-related dispute, the court did not refuse to review the complaint, nor did it find it inadmissible; it also issued a decision on its merits. If the court had not been competent, it should have left the claim without consideration or discontinued the case. Moreover, paragraph 11 of article 85 of the Law on Elections of People's Deputies of the Verhovna Rada of the Autonomous Republic of Crimea, Local Councils and Village, Township and City Mayors requires the court where the complaint is filed to inform the relevant electoral commission and the higher-level electoral commission immediately about the legal challenge and the decision taken by the court. As some of the author's complaints concerned the actions of the Sevastopol city electoral commission, the court notified the Central Electoral Commission. Moreover, according to paragraph 12 of article 85 of the said law, if the electoral commission receives a notification from the court about the initiation of similar proceedings, the electoral commission must return the complaint without consideration no later than one day after receiving the notification from the court, stating the reasons for its return. In this way, parallel appeals are avoided, and the law requires the complainant to choose one remedy. The judicial remedy to election-related disputes therefore appears to be a priority, rather than the submission of the complaint to the electoral commission.

5.2 It was therefore enough for the author to exhaust at least one of the remedies available, which he did by appealing to the court. He consequently submits that he has exhausted the domestic remedies available and his communication is admissible.

5.3 With regard to the merits of the communication, the European Court of Human Rights cases of *Kovach v. Ukraine* and *Kerimova v. Azerbaijan* concern situations similar to that of the author. The domestic electoral laws applied in *Kovach v. Ukraine* and in the present case are similar. Even though *Kovach v. Ukraine* concerns parliamentary elections while the current communication concerns local government elections, and these two categories of elections are regulated by two different laws, the provisions of the laws relating to the nature of complaints are analogous. In this regard, the State party did not explain the difference in the content of the laws (in particular between articles 70 and 72 of the Law on Parliamentary Elections and articles 73 and 75 of the Law on Elections), which could justify different applications and why such a difference would be material in the present communication. The author maintains that the present communication concerns not the candidate selection criteria but rather the way in which the voting results were reviewed. Unlike in the case of *Kovach v. Ukraine*, he was able to prove at the national level that the review was wrong. The main question in the present communication is whether the behaviour of the authorities and the normative regulation comply with the requirements of article 25 of the Covenant with regard to the obligation to consider the factual results of the vote, the authenticity of which was proven.

5.4 The author also challenges the State party's argument that the commissions were not aware of the violations at the time they were taking the decisions subsequently impugned. The author affirms that States parties must respect the standards established by the Covenant, irrespective of whether there is intent on the part of the authorities to violate such standards. States parties must eliminate the violations from the time they know about them. In that sense, the electoral commissions' members' lack of information about the court decisions may exempt them from personal responsibility for the violations, but not from the responsibility to remedy the violations once they are known.

5.5 The author notes that the court decisions were issued with the participation of the electoral commission, and included the mandatory requirement to inform a higher-level electoral commission; the commissions were therefore aware of the mistakes. Moreover, the court decision establishing the fact of violations of the election law was issued during the period when the electoral process had not yet been finalized; the violations could therefore have been effectively remedied. The author submits that the violation of the Covenant in the present communication consists in the fact that, even though he won the majority of votes, he was not recognized as the elected deputy of the Sevastopol City Council and was therefore not allowed to take part in the conduct of public affairs. The State party has not presented any arguments justifying this situation in the context of article 25 of the Covenant. The author reiterates that his rights have been violated under articles 2, 14 and 25 of the Covenant.

Issues and proceedings before the Committee

Consideration of admissibility

6.1 Before considering any claim contained in a communication, the Committee must decide, in accordance with rule 93 of its rules of procedure, whether the communication is admissible under the Optional Protocol.

6.2 The Committee has ascertained, as required under article 5 (2) (a) of the Optional Protocol, that the same matter is not being examined under another procedure of international investigation or settlement.

6.3 The Committee notes the State party's claim that the author has not exhausted all effective domestic remedies available to him, given that he has not appealed to the Central Electoral Commission with regard to the violations under article 25 of the Covenant. The Committee observes, however, that it is undisputed that the author did indeed lodge a complaint with the Circuit Administrative Court of Sevastopol and subsequently appealed to the Administrative Court of Appeal of Sevastopol. The State party has not identified any

other reasonably available remedies that the author could have been expected to exhaust. The Committee therefore considers that the requirements of article 5 (2) (b) of the Optional Protocol have been met.

6.4 The Committee notes the author's submission that the State party violated its obligations under article 2 of the Covenant because, even though the violation of electoral law had been determined at the national level, the author was deprived of the effective means to address the consequences of the violation. The Committee recalls its jurisprudence, according to which the provisions of article 2 of the Covenant lay down a general obligation for States parties, and do not give rise, when invoked separately, to a claim in a communication under the Optional Protocol.[5] The Committee considers that the author's claims under article 2 (3) should, however, be examined in conjunction with article 25 of the Covenant. It therefore considers the claims admissible.

6.5 The Committee notes the author's claim that his right under article 14 of the Covenant to be entitled in determination of his rights and obligations in a suit of law to a fair and public hearing by tribunal established by law was violated because, except for the decisions made in relation to the vote recount and the annulment of the election results from polling station No. 02076, the State party's courts declared themselves not competent to examine the author's complaints about the decisions taken by the electoral commissions and that the resolution of all election-related disputes was within the competence of the electoral commissions. The Committee also notes the State party's argument that the author should have lodged a complaint with the Central Electoral Commission, because the courts held that the correct resolution of the election results was beyond their competence and fell fully within that of the electoral commission. The Committee notes however the author's claim, which is not refuted by the State party, that State party law provides for two ways for appealing the actions of electoral commissions (with a higher-level electoral commission or through judicial review) and does not require that both ways be pursued simultaneously. The Committee therefore declares the author's claims under article 14 of the Covenant sufficiently substantiated for the purposes of admissibility.

6.6 The Committee notes the author's claims that he suffered a violation of his right to take part in the conduct of public affairs and to be elected at genuine periodic elections under article 25 of the Covenant. The Committee considers that the author has sufficiently substantiated, for the purposes of admissibility, his claims under articles 14 and 25, in conjunction with article 2 (3) of the Covenant, and therefore proceeds with its consideration of the merits.

Consideration of the merits

7.1 The Committee has considered the communication in the light of all the information submitted by the parties, in accordance with article 5 (1) of the Optional Protocol.

7.2 The Committee notes the author's claim that the circumstances of the election, where the electoral commission decided not to take the voting results of one polling station into account since the records had been lost, and the failure of the State party to remedy the ensuing violation of his rights, constituted a violation of article 25 of the Covenant. The Committee recalls that an independent electoral authority should be established to supervise the electoral process and to ensure that it is conducted fairly, impartially and in accordance with established laws that are compatible with the Covenant. The security of ballot boxes must be guaranteed. There should be independent scrutiny of the voting and counting processes and access provided to judicial review or another equivalent process so that electors have confidence in the security of the ballot and the counting of votes.[6] The Committee observes that the annulment of the voting results at polling station No. 02076, without ordering a new election or taking other action to remedy the fact that the election-related documentation had been lost, led directly to the declaration of Mr. G., and not the author, as the successful candidate. The Committee notes that the first instance court

[5] See *Castañeda v. Mexico* (CCPR/C/108/D/2202/2012), *A.P. v. Ukraine* (CCPR/C/105/D/1834/2008), para. 8.5 and *Basso v. Uruguay* (CCPR/C/100/D/1887/2009), para. 9.4.

[6] See Human Rights Committee, general comment No. 25 (1996) on participation in public affairs and the right to vote, para. 20.

overturned the decisions of the electoral commission, a decision that a higher court subsequently quashed. The Committee also notes that, although the author was contesting the election-related decisions at the time when the election results were still being established, several related decisions were taken almost contemporaneously. While acknowledging the legitimacy of speedy procedures when election-related decisions are contested, the Committee notes the author's explanation that he was unable to effectively file updated complaints, given that while he was lodging a complaint against one decision, other decisions of direct relevance to the impugned election were taken. Moreover, the decision recognizing Mr. G. as the elected deputy effectively brought an end to the election and made it impossible for the author to contest the outcome. The Committee also notes that the State party does not contest the facts concerning the court decisions as reported by the author, including the recognition of the failure to ensure the integrity of election-documentation. Therefore, in the circumstances of the author's case, the Committee concludes that the decision to annul entirely the voting results from polling station No. 02076 without ordering a recount was arbitrary. Coupled with the subsequent lack of access to an effective judicial review, this decision led to a disproportionate and unreasonable restriction of the author's rights under article 25, read alone and in conjunction with article 2 (3). In the light of the foregoing and in view of the material brought before it, the Committee concludes that the State party is responsible for breaching the author's rights under article 25, read alone and in conjunction with article 2 (3) of the Covenant.

7.3 Having found a violation of article 25, read alone and in conjunction with article 2 (3) of the Covenant, the Committee will not examine separately the author's claims under article 14 of the Covenant.

8. The Committee, acting under article 5 (4) of the Optional Protocol, is of the view that the facts before it disclose a violation by the State party of the author's rights under article 25, read alone and in conjunction with article 2 (3) of the Covenant.

9. In accordance with article 2 (3) (a) of the Covenant, the State party is under an obligation to provide the author with an effective remedy. This requires it to make full reparation to individuals whose Covenant rights have been violated. In the present case, the State party is under an obligation to, inter alia, provide adequate compensation and appropriate measures of satisfaction, including reimbursement of any legal costs, also with regard to non-pecuniary losses incurred by the author. The State party is also under an obligation to take all steps necessary to prevent similar violations in the future.

10. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy when it has been determined that a violation has occurred, the Committee wishes to receive from the State party, within 180 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the present Views, and to have them translated in the official languages of the State party and widely disseminated.